Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1977

No. 77-95

CONTINENTAL ACCEPTANCE CORP.,
Petitioner,

vs.

GUADALUPE RIVERA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals, Eighth District Of Ohio

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July 14, 1977

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Supreme Court of the United States

October Term, 1977

No. _____

CONTINENTAL ACCEPTANCE CORP.,
Petitioner,

vs.

GUADALUPE RIVERA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals, Eighth District Of Ohio

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

Continental Acceptance Corp., the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Ohio Court of Appeals, Eighth District, entered in the above-entitled case on December 30, 1976.

OPINIONS BELOW

The order of the Supreme Court of Ohio overruling petitioner's Motion for an Order directing the Court of Appeals for Cuyahoga County to certify its record is printed in Appendix A hereto, *infra*, page A1. The opinion of

the Ohio Court of Appeals, Eighth District, is reported at 50 Ohio App. 2d 338 (1976), and is printed in Appendix A hereto, *infra*, page A2. The journal entry of the Ohio Court of Appeals, Eighth District, is printed in Appendix A hereto, *infra*, page A14. The agreed statement as the record on appeal of the Municipal Court of Cleveland, Ohio, is printed in Appendix A hereto, *infra*, page A15.

JURISDICTION

The judgment of the Ohio Court of Appeals, Eighth District (Appendix A, *infra*, page A14) was entered on December 30, 1976. A timely notice of appeal to the Supreme Court of Ohio was filed. A timely motion for an order directing the Court of Appeals for Cuyahoga County to certify its record was overruled on April 21, 1977 (Appendix A, *infra*, page A1). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Does the one year limitation on actions provision (15 U.S.C. §1640(e)) of the Consumer Credit Protection Act, also known as the Truth in Lending Act, 15 U.S.C. §§1601 *et seq.*, preclude a party from raising disclosure violations of the aforementioned Truth in Lending Act as a defense in a suit initiated upon the party's default on a credit obligation over four years after credit was extended and after said violations occurred?

2. Does the provision of the Consumer Credit Protection Act, also known as the Truth in Lending Act, 15 U.S.C. §§1601 *et seq.*, regulating a debtor's use of a

creditor's potential liability for violations of the aforementioned Truth in Lending Act as a setoff (15 U.S.C. §1640(h)) preclude a debtor from raising disclosure violations of the Truth in Lending Act as a defense in a suit upon the underlying credit obligation where the debtor has not reduced his claim to a judgment in an action to which such debtor was a party within the one year limitation on actions provision of the Truth in Lending Act (15 U.S.C. §1640(e))?

3. Can a State Appellate Court ignore provisions of a plan of settlement entered into in a Bankruptcy proceeding?

CONSTITUTION AND STATUTES INVOLVED

15 U.S.C. §1640(e)

(e) Jurisdiction; period of limitations. Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

15 U.S.C. §1640(h)

(h) Setoff. A person may not take any action to offset any amount for which a creditor is potentially liable to such person under subsection (a) (2) against any amount owing to such creditor by such person, unless the amount of the creditor's liability to such person has been determined by judgment of a court of competent jurisdiction in an action to which such person was a party.

U. S. Const., Art. VI, §2

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

STATEMENT OF THE CASE

On May 15, 1970, Respondent, Guadalupe Rivera, entered into a contract with the Steel Workers Credit Union, a.k.a. Federation Worker's Credit Union, for the extension of a loan to be paid in installments totaling $1,959.97. Sometime thereafter, said Credit Union filed for bankruptcy in part due to large scale criminal embezzlement by its management. At the time of the filing for bankruptcy, Respondent had savings of $1,021.22 in a share account of the Credit Union and an outstanding loan balance of $623.58.

During the bankruptcy proceeding, the accounts of the Credit Union were adjusted pursuant to a Stipulation of Plan of Settlement entered into by a class composed of share account holders and the Trustee of the Bankrupt's estate. The Bankruptcy Court approved said plan of settlement. The respondent did not opt out of the class and did not file a proof of claim pursuant to the settlement; he was for all purposes treated as a member of the class of share account holders.

Respondent received a credit of less than thirty-one cents ($.31) on the dollar for the amount in his share account. The credit was applied directly to his outstanding loan balance, reducing it to $496.57. Thereafter, the loan portfolio of the Credit Union was sold to the Petitioner pursuant to an order of the Bankruptcy Court.

Petitioner filed a complaint in Cleveland Municipal Court on December 19, 1974, seeking to recover on the promissory note which evidenced respondent's loan. Respondent filed an answer denying liability on the note and asserting as a "defense" recoupment based upon petitioner's assignor's alleged failure to comply with certain requirements set forth in the Truth in Lending Act, 15 U.S.C. §§1601 *et seq.*

The case was tried to the court and on July 31, 1975, judgment was entered for petitioner in the amount of $511.87. The trial court ruled that respondent's Truth in Lending "defense" was barred by the one year statute of limitations contained in 15 U.S.C. §1640(e). Respondent prosecuted an appeal to the Ohio Court of Appeals of the Eighth Judicial District, Cuyahoga County. The Appellate Court reversed the trial court in a decision rendered on December 30, 1976. Petitioner sought review of the Ohio Supreme Court, but its Motion for an Order directing the Court of Appeals for Cuyahoga County to certify its record was overruled on April 21, 1977.

REASONS FOR GRANTING THIS WRIT

In the courts below, there was little question regarding respondent's liability on the promissory note upon which this litigation was commenced; respondent had contractually obligated himself to repay the funds extended him. The only issue in dispute was the matter of respondent's alleged Truth in Lending "defense."

Respondent styled his counterclaim for Truth in Lending Act[1] disclosure violations as "a defense by way of recoupment which is not barred by the statute of limitations.[2]" *Continental Acceptance Corp. v. Rivera*, 50 Ohio App. 2d 338, at 344 (1976). The Court of Appeals for the Eighth Judicial District of Ohio relied upon respondent's characterization of his claim, an unscrutinized general rule regarding the common law doctrine of recoupment,[3] and a cryptic statement extracted from a decision of this court,[4] in sustaining respondent's argument.

A writ for certiorari should be granted to permit review of the Ohio Court's decision as it:

(A) Misconstrues federal statutory law so as to allow relief on a claim extinguished for all purposes, defensive or otherwise;

(B) Erroneously interprets federal case law to achieve the result noted in (A), *supra;*

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1. 15 U.S.C. §§1601 *et seq.*

2. The statute of limitations respondent sought to avoid is contained in 15 U.S.C. §1640(e), which provides:

> Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, *within one year from the date of the occurrence of the violation.* (Emphasis supplied).

3. 50 Ohio App. 2d at 344, footnote 17, quoting from 3 J. MOORE'S FEDERAL PRACTICE, para. 13.02, note 1, in material part as follows:

> "Recoupment" is defined as . . . "a demand arising from the same transaction as the plaintiff's claim. . . ."

4. 50 Ohio App. 2d at 345, footnote 18, quoting from *Bull v. United States*, 295 U.S. 247, 262 (1934), as follows:

> Recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely.

(C) Defeats the purpose of the statute of limitations contained in 15 U.S.C. §1640(e), thereby thrusting an undue burden on institutions which extend credit and those which assist in recovering due and owing debts, while furthering no apparent purpose of the Truth in Lending Act; and

(D) Ignores a Plan of Settlement approved by a Federal Bankruptcy Court.

(A) THE APPELLATE COURT BELOW MISCONSTRUED FEDERAL STATUTORY LAW TO ALLOW RELIEF ON A CLAIM EXTINGUISHED FOR ALL PURPOSES, DEFENSIVE OR OTHERWISE.

To reiterate, the Ohio Court of Appeals held that the statute of limitations found in 15 U.S.C. §1640(e) does not bar a counterclaim defense of recoupment.[5] This decision is incorrect for several reasons.

Initially, it must be borne in mind that despite the concurrent jurisdiction Congress granted state and federal courts over claims for violations of the provisions of the Truth in Lending Act,[6] it is federal law which must be applied to and which controls the resolution of this matter.[7]

By enacting the Truth in Lending Act, Congress placed certain duties upon institutions engaged in the business of extending consumer credit. The responsibility to enforce these duties lies in the hands of those members of the public sector for whose protection the Act was designed, i.e., persons utilizing consumer credit. The comprehensive

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5. 50 Ohio App. 2d at 348.

6. 15 U.S.C. §1640(e).

7. U. S. Const. Art. VI, §2.

scheme devised by Congress includes limits as to where and when the private enforcement of the rights given consumers can occur. In *Osbourne v. United States,* 164 F.2d 767 (2d Cir. 1947), the Court made the following comment regarding time limitations found in such statutes:

> Generally, where a statute creates a cause of action which was unknown at common law, a period of limitation set up in the same statute is regarded as a matter of substance, *limiting the right as well as the remedy.* 164 F.2d at 768. (emphasis supplied).

Though *Osbourne v. United States, supra,* involved a seaman's attempt to seek affirmative relief beyond the limitation periods of the Suits in Admiralty Act, 46 U.S.C. §745, and The Jones Act, 46 U.S.C. §688, 45 U.S.C. §56, the court's observations indicate that the rule announced therein can hardly be considered inapposite to the issue at hand. The rule not only bars affirmative action but operates so:

> [t]hat the period of limitation under any of these acts will not be extended, as it would be in the case of an ordinary statute of limitations, by a claimant's disability to sue because of infancy or insanity or by a delay occasioned by the fraud of the defendant; and . . . the defendant cannot waive the defense of the period of limitations. 164 F.2d at 768. (Citations omitted.)

In short, when a statute creates a cause of action which did not exist at common law and establishes a time limit within which such cause of action must be availed, a failure to exercise such *right* will result in its being extinguished, not merely the remedy barred.

At least one court has examined the very statute of limitation at issue herein and concluded that the proscription of the general rule noted in *Osbourne v. United States, supra,* applies to 15 U.S.C. §1640(e). *Fenton v. Citizens Saving Association,* 400 F. Supp. 874 (1973), stands for the proposition that:

> [w]here the time-barring provision is a part of the very statute that creates the cause of action not existing at common law, and where it is the clear intent of Congress as shown in the statute that the bringing of the action within the time period is a condition of establishing jurisdiction, the failure to assert the cause of action by bringing suit within that time period results in the District Court not having jurisdiction over the subject matter. *Fenton v. Citizens Saving Association,* 400 F. Supp. 874, at 879 (1973).

While *Fenton v. Citizens Saving Association, supra,* involved a plaintiff's attempt to obtain affirmative relief for alleged Truth in Lending Act violations, it is difficult to conceive a valid reason why a like result should not follow here, particularly where Congress has not seen fit to distinguish between affirmative and defensive uses of claims.

The respondent herein was clearly as culpable (in terms of a lack of diligence in asserting his claim) as the party in that case.

(B) THE OHIO APPELLATE COURT BELOW MISINTERPRETED FEDERAL CASE LAW TO ALLOW RELIEF ON A CLAIM EXTINGUISHED BY THE BAR OF THE STATUTE OF LIMITATIONS CONTAINED IN 15 U.S.C. §1640(e).

As was previously noted,[8] the Ohio Court of Appeals relied primarily upon a commentator's statement of the general rule regarding the common law doctrine of recoupment, and an isolated statement made by this Court, in ruling for the Respondent. The Appellate Court's agreement with respondent's characterization of his claim enabled the court to render 15 U.S.C. §1640(e) nugatory. An examination of the case authority dealing with and explaining genuine claims of recoupment reveal the error in the Appellate Court's determination and, hence, its error in dismissing the bar of 15 U.S.C. §1640(e).

In *Bull v. United States*, 295 U.S. 247 (1934), this Court made the statement that:

> [r]ecoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely. 295 U.S. at 262.

While this may be an operational pronouncement of the doctrine of recoupment in the context of a case which calls for its application, this statement and the case in which it was made convey a deceivingly broad and quite inaccurate impression of the scope of the common law doctrine and the situations to which it pertains.

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8. See page 6, *supra*.

In *Bull v. United States, supra*, this Court was dealing with the administration of tax laws. This focus was more fully emphasized in *Rothensies v. Electric Battery Co.*, 329 U.S. 296 (1946), another tax case in which recoupment was treated. Whatever significance this Court's observations may have had for the purpose of tax law, it is hardly likely that rules of general applicability were intended. The authority cited by this Court in *Bull v. United States, supra*, for the aforequoted passage bear this contention out.

The opinion in *Bull v. United States, supra*, relied upon both federal and state decisions. One such case, *Stewart v. Simon*, 111 Ark. 358, 163 S.W. 1135 (1914), is illustrative of the proper scope of common law recoupment. In *Stewart v. Simon, supra*, Stewart's administratrix brought suit on a negotiable promissory note executed by the appellees to the decedent. The appellees filed a counterclaim alleging that the decedent was indebted to them for damages in excess of the amount of the note for failure to construct a building which they had employed him to construct, and that the note sued upon was executed to cover the final payment on the contract price for constructing the building. 111 Ark. at 359, 163 S.W. at 1136. The court stated:

> The counterclaim of appellees, regarded as an affirmative action against said decedent, was barred by the statute of limitations; but the defense presented seems to have been treated as a recoupment of unliquidated damages *arising from a breach of the contract, or as a failure of consideration for which the note was given*, and in that view of the case the claim was not barred. 111 Ark. 359, 163 S.W. at 1136. (Citations omitted); (emphasis supplied).

The court went on to hold that despite the claim's qualification as a recoupment, the appellees were estopped to raise it for an unrelated, independent reason.

The court in *Aultman & Co. v. Torrey,* 55 Minn. 492, 57 N.W. 211 (1893), was faced with a situation in which a time-barred claim for a breach of warranty, which resulted in damages equal to the amount of notes given by the defendant to the plaintiff for the purchase of the warranted harvester, was raised as a defense by way of recoupment in a suit on the note. The court held this claim to be proper for a recoupment, which it explained as follows:

> Recoupment or reduction of a demand is said to arise where there is an action upon a contract, and there has been a breach of the contract, or some divisible part of it, or obligation connected with it. 55 Minn. 492, 57 N.W. 211.

Accord: *Blackshear v. Dekle,* 120 Ga. 766, 48 S.E. 311 (1904), defense in nature of recoupment that defendant had paid the note in kind was permitted in a suit on the note where the statute of limitations had run on an action for conversion; *Williams v. Neely,* 134 F. 1 (1904), defendants were permitted to raise a claim otherwise barred by a statute of limitations for breach of a covenant against encumbrances where plaintiff's assignor and the plaintiff himself knew of the encumbrances before he took the note upon which suit was begun. The thrust of these cases upon which this Court relied in *Bull v. United States, supra,* is cogently articulated in the more recent case of *Hodges v. Community Loan & Investment Corporation of North Georgia,* 133 Ga. App. 336, 210 S.E.2d 826 (1974), *aff'd on ground cited,* 234 Ga. 427, 216 S.E.2d 274 (1975).

In *Hodges, supra,* the Court was presented with a state of facts which parallel those in petitioner's case, except that in *Hodges,* the plaintiff sued in assumpsit for the amount of its loan due to an infirmity in the loan contract which precluded its enforcement. The Court first observed:

> The Truth-In-Lending claim is not an integral part of the action for money had and received, it is merely ancillary to that action . . ., all of the issues of the assumpsit claim subjudice can be considered by the court without a consideration of borrower's Truth-In-Lending counterclaim. 133 Ga. App. at 342, 210 S.E. 2d at 831.

The Court then held the claim to be within the bar of the statute of limitations (15 U.S.C. §1640(e)). 133 Ga. App. at 343, 210 S.E.2d at 831.

On motion for rehearing, the borrowers suggested that their claim was in the nature of recoupment and, hence, not barred. The Court rejected this argument, stating that:

> The rationale for the non-applicability of a statute of limitations to a defense in the nature of recoupment is that the defense arises out of the very contract which the plaintiff wishes to enforce. . . . *But the defense must arise via an obligation or covenant of the contract. . . .*
>
> The Truth-In-Lending counterclaim subjudice *did not arise out of the mutual obligations or covenants of the loan transaction upon which the suit was founded but is independent thereof.* Although the claim arose contemporaneously with the execution of the contract, it is not a product of a breach of any

obligation or covenant therein; nor is it related either to the subject matter of the contract or the plaintiff's suit. . . . The borrower's claim for recovery of a penalty created by Federal law is an extrinsic by-product of this transaction and is not dependent upon the lender's contractual obligations. . . .

In short, *it is not a defense which goes to the justice of the lender's claim but an affirmative action which demands a penalty for an independent wrong.* 133 Ga. App. at 343, 344, 210 S.E.2d at 832 (emphasis supplied).

Although the *Hodges* Court's analysis may not appeal to those with pro-consumer sympathies, it is an entirely accurate assessment of the common law doctrine of recoupment and its unavailability to those seeking to raise as defenses claims barred by 15 U.S.C. §1640(e).

Finally, while claims which do qualify as common law recoupments generally avoid the preventive purpose of statute of limitations, one point must be kept in mind. The common law rule applied to claims such as those noted in *Hodges, supra.* With a specific statute of limitations created as part of a statute establishing a cause of action unknown at common law come the unique considerations detailed in part (A), *supra.* For this additional reason, certiorari should be granted.

(C) THE DECISION OF THE OHIO APPELLATE COURT BELOW IN PART IGNORES THE CONGRESSIONAL PURPOSE BEHIND INCLUDING THE LIMITATIONS PROVISIONS (15 U.S.C. §1640(e)) IN THE TRUTH IN LENDING ACT AND PLACES AN UNDUE BURDEN ON LENDING INSTITUTIONS, WHILE FURTHERING NO APPARENT PURPOSE OF THE TRUTH IN LENDING ACT.

While it would be at best difficult to itemize every consideration which led Congress to adopt the statute of limitations provision of the Truth in Lending Act (15 U.S.C. §1640(e)), one can safely assume that the general reasons advanced in support of such statutes were among the motivating factors.

The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. *Order of Railroad Telegraphers v. Railway Express Agency,* 321 U.S. 342, 348, 349 (1944).

To permit the decision of the Ohio Court of Appeals to stand would be contrary to this fundamental theory.

Additionally, the Court of Appeals' decision serves little purpose beyond creating uncertainty amongst lenders and those who assist them in collecting debts. In the Court's decision lies a potential for countless claims of "defense" which arose when such institutions were unfamiliar with the precise workings of the Truth in Lending Act and which, like Respondent's claim, had been for years barred as affirmative actions. Moreover, as one court has noted:

> The design of the Act (Truth in Lending Act) was to provide protection for consumers by affording them, through meaningful disclosure, an opportunity to compare and shop for credit. The Act should be used to protect consumers, but it should not be used to thwart the valid claims of creditors. *Ken-Lu Enterprises, Inc. v. Neal*, 29 N.C. App. 78, 223 S.E.2d 831, 835 (1976).
>
> In another context, this Court has decided that:
>
> If there are to be exceptions to the statute of limitations, it is for Congress rather than for the courts to create and limit them. *Rothensies v. Electric Battery Co., supra,* 329 U.S. at 303.

Congress has not seen fit to create such exceptions,[9] although comparable pieces of legislation have provided for such relief.[10] Given this state of facts, it would seem that the aforequoted statement of this Court in *Rothensies* applies with equal force to the matter which is the subject of this petition.

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9. *Ken-Lu Enterprises, Inc. v. Neal, supra,* stands for the proposition that 15 U.S.C. §1640(h), an amendment to the Truth in Lending Act (By Section 408(d) of Public Law No. 93-495; effective October 28, 1974), has precluded claims such as Respondent's altogether. See text of statute at page 3, *supra.* This issue was not briefed for the Ohio Court of Appeals, but counsel for petitioner raised it orally before the Court at oral argument.

10. See, e.g., Indiana Code 1971, 24-4.5-5-205 (Burns Code Ed.). This statute, a part of the Uniform Consumer Credit Code as adopted by Indiana, provides:

> Refunds or penalties to which the debtor is entitled pursuant to this part . . . may be setoff against the debtor's obligation, and may be raised as a defense to a suit on the obligation without regard to the time limitations prescribed by this part. . . .

Whereas many of the UCCC sections were derived from the Consumer Credit Protection Act (Truth in Lending), the origin of this provision is not indicated in either the Indiana Code or the official text of the UCCC.

(D) THE OHIO APPELLATE COURT BELOW IGNORED A PLAN OF SETTLEMENT TO WHICH RESPONDENT WAS A PARTY, ENTERED INTO IN PETITIONER'S ASSIGNOR'S BANKRUPTCY.

The Ohio Appellate Court's decision virtually ignored the bar of paragraph five of the Plan of Settlement (see Appendix B, *supra,* page A25), construing it in a most narrow, unintended manner. 50 Ohio App. 2d at 347.

In the case of *In Re Four Seasons Securities Laws Litigation,* 502 F.2d 834 (10th Cir. 1974), *cert. den.,* 95 S. Ct. 516 (1974), a class action was settled with the approval of the court much in the same way the action involved here was handled. There an absent party claimed it was not bound by the settlement, although it had been given notice similar to that given Respondent. The Court held:

> We are constrained to conclude that due process was satisfied here when Ohio (the absent party) received the notice and order delineating the terms of the proposed settlement, and informing Ohio that it was designated as a member of the class, and that it had the opportunity to opt out or be represented by counsel. 502 F.2d at 853.

Having received adequate notice and representation and not having opted out, Respondent was bound by the Settlement and the Appellate Court was without authority to limit its terms.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ohio Court of Appeals, Eighth District.

Respectfully submitted,

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July 14, 1977

APPENDIX A

Order of the Supreme Court of Ohio Denying Leave to Appeal

(Dated April 21, 1977)

No. 77-201

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

CONTINENTAL ACCEPTANCE CORP.,
Appellant,

vs.

GUADALUPE RIVERA,
Appellee.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

Opinion of Ohio Court of Appeals

(Decided December 30, 1976)

No. 35265

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT,
COUNTY OF CUYAHOGA

CONTINENTAL ACCEPTANCE CORP.,
Appellee,

vs.

GUADALUPE RIVERA,
Appellant.

Truth in lending—Section 1639, Title 15, U. S. Code—Failure to list charge for credit life insurance in credit agreement as part of "amount financed" or "finance charge" violates statute—Statute of limitations—Not applicable to recoupment defense in counterclaim.

1. Where a consumer credit agreement includes a charge for credit insurance, but fails to itemize the charge as part of the "amount financed" or the "finance charge," the credit agreement violates the disclosure requirements of the Federal Truth-in-Lending Act, Section 1639(a), Title 15, U. S. Code, Regulation Z, 12 CFR Section 226.8(d).

2. Truth-in-Lending violations and concommitant damages asserted in a counterclaim is a recoupment, not a setoff, where the counterclaim arises out of the credit agreement which is the subject of the complaint.

3. The defense of recoupment is not barred by the Statute of Limitations, Section 1640(e), Title 15, U. S. Code, where the establishment of the Truth-in-Lending violations emerges from the consumer credit loan upon which the complaint is based. Recoupment defeats the plaintiff's claim up to but not to exceed the amount of the claim. Recoupment is a defense and cannot be the basis for affirmative relief.

4. The Statute of Limitations, Section 1640(e), Title 15, U. S. Code, does not bar the defense of recoupment because permitting the bar would frustrate the fundamental policy of the Federal Truth-in-Lending Act, Section 1601, Title 15, U. S. Code.

DAY, J. This action[1] involves construction and application of the Federal Truth-in-Lending Act, Section 1601, Title 15, U. S. Code *et seq.* Plaintiff-appellee (plaintiff), Continental Acceptance Corporation, filed this action in the Cleveland Municipal Court on December 13, 1974, against defendant-appellant (defendant), Guadalupe Rivera for the recovery of $511.87, plus costs and interest. That amount was owed by defendant on a promissory note. Defendant filed an answer[2] and a motion for summary judgment, which was overruled by the court. The case was tried to the court.

At trial it was disclosed that defendant had entered into a contract with the Steel Workers Credit Union, on May 15, 1970, for the extension of a consumer credit loan, together with credit insurance charges, to be paid in in-

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1. The record here consists solely of an agreed statement pursuant to App. R. 9(D).

2. In his answer defendant denies liability on the note and asserts as a defense, recoupment based upon plaintiff's alleged failure to comply with certain requirements set forth in the Truth-in-Lending Act.

stallments totaling $1,959.97. The loan agreement specified that the "Amount Financed" was $1,686.36, the "Finance Charge" was $273.61, and the "Annual Percentage Rate" was 12%.[3] As part of the transaction, but in a separate document, defendant agreed to pay $72.99 for group credit life insurance and group disability insurance.

The Credit Union subsequently filed for bankruptcy at a time when defendant had amassed savings of $1,021.11 at the Credit Union, and still owed the Credit Union $623.58 on the loan agreement. Pursuant to the Stipulation of Plan of Settlement, accepted by the Bankruptcy Court, defendant, a member of the class bound by the agreement,[4] was to receive credit for less than 31% of his savings. Upon setting off the adjusted savings figure against the loan balance, it was determined that defendant owed $496.57 on the loan. The Bankruptcy Court approved the sale and transfer of the Credit Union's loan portfolio (including defendant's loan agreement) to the plaintiff.[5]

The trial court entered judgment for plaintiff in the amount of $511.87[6] upon finding that defendant's answer, raising the Truth-in-Lending defenses:

"* * * was (1) foreclosed to Defendant by paragraph 5 of the Stipulation of Plan of Settlement limiting the right of set-off and (2) precluded by the one-year Statute of

3. The loan agreement also specified the number of payments, amount of payments, date of the first payment, and the frequency of payments.

4. "The defendant did not opt out of the settlement and did not file a proof of claim pursuant to the settlement and was treated as a member of the class."

5. The loan portfolio had a face value of $1,090,000 and was sold to plaintiff for $150,000.

6. This figure is apparently based upon the amount of the principal and interest due on the note and for costs of the suit.

Limitations of the Truth in Lending Act, Section 130(e), 15 U. S. C. A. §1640(e),"

Defendant timely appeals raising two assignments of error. For reasons assessed below we find both well taken. We reverse and remand with instructions to enter judgment for defendant.

I

Assignment of Error No. I:

"I. The court below erred in its failure to find that the consumer credit transaction upon which plaintiff-appellee brought suit violated the Truth-in-Lending Act in that the constituent parts of the 'amount financed' and to [*sic*] the 'finance charge' were not separately itemized and that such itemization did not include the cost of credit insurance charged to the defendant-appellant."

The Federal Truth-in-Lending Act, Section 1601, Title 15 U. S. Code, *et seq.*, was enacted for the purpose of compelling creditors to fully disclose to borrowers the specific terms of consumer credit agreements, see Section 1601, Title 15, U. S. Code; see also *Woods v. Beneficial Finance Co. of Eugene* (1975, D. Ore.), 395 F. Supp. 9, 12, and *Meyers v. Clearview Dodge Sales, Inc.* (1974, E. D. La.), 384 F. Supp. 722, 726. Specifically, the Act and the regulations promulgated pursuant to it[7] require, in pertinent part, that the agreement separately state the total "amount of credit," all charges (individually itemized) included in the credit amount but not part of the finance charge, and the amount of the "finance charge," Section

7. Section 1604, Title 15, U. S. Code, empowers the Federal Reserve Board to prescribe regulations to carry out the purposes of the Act.

1639(a), Title 15, U. S. Code.[8] Each category must include individual itemizations of the charges which comprise the total, Regulation Z, 12 CFR Section 226.8(d).[9]

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8. Section 1639(a), Title 15, U. S. Code, provides:

"Consumer loans not under open end credit plans—Required disclosures by creditor.

"(a) Any creditor making a consumer loan or otherwise extending consumer credit in a transaction which is neither a consumer credit sale nor under an open end consumer credit plan shall disclose each of the following items, to the extent applicable:

"(1) The amount of credit of which the obligor will have the actual use, or which is or will be paid him or for his account or to another person on his behalf.

"(2) All charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge.

"(3) The total amount to be financed (the sum of the amounts referred to in paragraph (1) plus the amounts referred to in paragraph (2)).

"(4) Except in the case of a loan secured by a first lien on a dwelling and made to finance the purchase of that dwelling, the amount of the finance charge.

"(5) The finance charge expressed as an annual percentage rate except in the case of a finance charge.

"(A) which does not exceed $5 and is applicable to an extension of consumer credit not exceeding $75, or

"(B) which does not exceed $7.50 and is applicable to an extension of consumer credit exceeding $75.

"A creditor may not divide an extension of credit into two or more transactions to avoid the disclosure of an annual percentage rate pursuant to this paragraph.

"(6) The number, amount, and the due dates or periods of payments scheduled to repay the indebtedness.

"(7) The default, delinquency, or similar charges payable in the event of late payments.

"(8) A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates."

9. Regulation Z, 12 CFR Section 226.8(d) provides: * * *

"(d) Loans and other nonsale credit. In the case of a loan or extension of credit which is not a credit sale, in addition to

(Footnote continued on following page)

In the instant case defendant agreed, in a document separate from the credit agreement,[10] to pay for credit insurance. The credit agreement fails to specify whether the credit insurance was computed as part of the "amount financed" or the "finance charge." The agreement contains no itemizations to disclose where the credit insurance charge was computed.[11] Regardless of where the credit insurance cost was included, plaintiff's failure to itemize the charge in the credit agreement violated the express requirements and underlying purpose of the Truth-in-

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Footnote Continued—

the items required to be disclosed under paragraph (b) of this section, the following items, as applicable, shall be disclosed:

"(1) The amount of credit, excluding items set forth in paragraph (e) of this section, which will be paid to the customer or for his account or to another person on his behalf, including all charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge, using the term 'amount financed.'

"(2) Any amount referred to in paragraph (e) of this section required to be excluded from the amount in subparagraph (1) of this paragraph, using, as applicable, the terms 'prepaid finance charge' and 'required deposit balance,' and, if both are applicable, the total of such items using the term, 'total prepaid finance charge and required deposit balance.'

"(3) Except in the case of a loan secured by a first lien or equivalent security interest on a dwelling and made to finance the purchase of that dwelling, the total amount of the finance charge, with description of each amount included, using the term 'finance charge.'"

10. Plaintiff apparently ignored the requirement that all terms appear on one side of the same page, Regulation Z, 12 CFR Section 226(a). All of the disclosures, insurance costs and others, should have been disclosed in a single document, see *Ljepava v. M. L. S. C. Properties* (1975, 9th Cir.), 511 F. 2d 937, 942.

11. This credit insurance could have been itemized as part of the "amount of credit" or as part of the "finance charge" because the credit insurance agreement specified that the coverage was "* * * not a factor in the approval by the creditor of the extension of credit * * *," see Section 1605(b)(1), Title 15, U. S. Code. However, the credit insurance must be specifically itemized in one of the two categories, see regulation Z, 12 CFR Section 226.4(b)(2).

Lending Act. Similar failures to itemize particular charges have consistently been held violative of the Act. See, *e. g.*, *Simmons v. American Budget Plan, Inc.* (1974, E. D. La.), 386 F. Supp. 194, 198;[12] *Meyers v. Clearview Dodge Sales, Inc.* (1974, E. D. La.), 384 F. Supp. 722, 725;[13] *Johnson v. Associates Finance, Inc.* (1974, S. D. Ill., N. D.), 369 F. Supp. 1121, 1122.[14]

The first assignment of error is well taken.[15]

II

Assignment of Error No. II:

"II. The court below erred in denying defendant-appellant statutory Truth-in-Lending damages up to the

12. *Simmons* held that the agreement abrogated Section 1629(a)(1)(2), Title 15, U. S. Code, by failing to individually itemize as part of the amount financed a notarial fee and fees for certificates and recordation in connection with a mortgage by which the loan was secured, *supra* at 198.

13. *Meyers* dealt with the retail credit purchase of an automobile. The court held that the various disclosure requirements of the Truth-in-Lending Act required itemization of the "Tag, Title, and Fees" as part of the finance charge, the "Documentary Service Fee" as part of the amount financed, and the "Finder's Fee" under the finance charge, *supra* at 725-726. The failure of the seller to make these itemizations was held to be a violation of the Act's various disclosure requirements.

14. In *Johnson* the court decided that even if all of the finance charge was composed of "interest," Regulation Z [12 CFR Section 226.8(d)(3)] required that such fact be set forth in a description of the finance charge, *supra* at 1122. See also *Woods v. Beneficial Finance Co. of Eugene, supra* at 16.

15. We make note that plaintiff asserted no argument in its brief in answer to defendant's first assignment of error.

Defendant seeks damages, by way of recoupment, in the amount prescribed by statute, Section 1640(a), Title 15, U. S. Code, as twice the amount of the finance charge. Here the finance charge was $273.61. Therefore, upon finding the instant Truth-in-Lending Act violations, defendant would be entitled to damages in the amount of $547.22 were his claim an original and timely action.

amount of appellee's demand where the appellant's claim for such damages arises from the subject of the appellee's complaint and is raised in defense by way of recoupment; and specifically erred in its reliance upon a statute of limitation, 15 U. S. C. A. §1640(e), and upon an inapplicable stipulation of settlement approved in an unrelated bankruptcy action."

This assignment of error raises two principal issues: First, whether the defensive truth-in-lending counterclaim, asserted by defendant, is barred by the Statute of Limitations, Section 1640(e), Title 15, U. S. Code, and second, whether the Stipulation of Plan of Settlement, executed in the separate bankruptcy proceeding, bars the defensive pleading.

A. *Statute of Limitations*: Defendant concedes that the Statute of Limitations, Section 1640(e), Title 15, U. S. Code,[16] barred defendant from asserting his truth-in-lending claims in an original action. However, defendant argues that his counterclaim is, in effect a defense by way of recoupment which is not barred by the Statute of Limitations.

Defendant's Truth-in-Lending counterclaim is a recoupment, not a setoff, because it arises out of the same transaction as plaintiff's claim, *i. e.* the loan agreement.[17]

16. Section 1640(e), Title 15, U. S. Code, provides: "(e) Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation."

17. "Recoupment" is defined as "* * * a demand arising from the same transaction as the plaintiff's claim * * *," whereas a "set off" is "* * * a demand asserted to diminish or extinguish plaintiff's demand, which arises out of a transaction different from that sued on, and which must be liquidated and emerge from a contract or judgment." 3 *J. Moore's Federal Practice*, Para. 13.02, note 1.

(Continued on following page)

The counterclaim of recoupment is not barred by the one-year Statute of Limitations for several reasons.

The Statute of Limitations does not bar a defense, such as recoupment,[18] which is based on facts arising out of the transaction which is the subject of the complaint,[19] and which does not require affirmative action of the court, cf. *Summers v. Connolly* (1953), 159 Ohio St. 396, 405. In *Summers* the court drew the distinction between "true" or "pure" defenses, to which the Statute of Limitations bar does not apply, and those which are not strict defenses, such as setoff, to which the bar is operative. The "true" or "pure" defenses are those in which the "* * * matters pleaded in defense grow out of or are connected with the matters pleaded in the petition, so that the establishment of the facts so pleaded in defense would defeat recovery

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Footnote continued—

Here, defendant's Truth-in-Lending claim emerges from the note upon which plaintiff's claim is grounded. The Truth-in-Lending claim is a recoupment because even though "* * * it may involve certain additional facts or a differing perception thereof * * * [it] nevertheless involves the same transaction, * * *" *Ballew v. Associates Financial Services Company of Nebraska, Inc., supra.* (Bracketed material added.)

18. "* * * [R]ecoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely." (Bracketed material added, footnote omitted.) *Bull v. United States* (1934), 295 U. S. 247, 262, 79 L. Ed. 1421, 1428.

19. Statutes of Limitation are grounded on the theory that they avoid stale litigation. That purpose is achieved by preventing litigation of a different transaction, such as a counterclaim for setoff, where the setoff could not have been brought as an original action due to the bar of the Statute of Limitations.

Only the transaction raised in the complaint is the focus of a counterclaim of recoupment. Because the transaction is already before the court, permitting the claim of recoupment facilitates an examination of the subject of the suit in all its particulars so that a judgment is "* * * rendered that does justice in view of the one transaction as a whole," *Rothensies v. Electric Battery Co.* (1946), 329 U. S. 296, 299, 91 L. Ed. 296, 299.

* * *." *Summers v. Connolly, supra.* *Summers* is not dispositive here because that case involved a setoff not recoupment.[20]

In the instant case the defense of recoupment is not barred by the Statute of Limitations because the establishment of the Truth-in-Lending violations emerges from the transaction upon which plaintiff's complaint is based, and defeats the entire amount of plaintiff's $511.87 claim (see fn. 15). However, the right to assert recoupment is defensive only. It will not support affirmative relief.[21] *Cf. Summers v. Connolly, supra.*[22]

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20. In *Summers* the court held that the Statute of Limitations barred a setoff asserted in defendant's answer in an action against the administrator of an estate to recover an heir's distributive share where the setoff was based on a separate transaction involving a promissory note executed between the decedent and the heir, *supra* at 414-415. The court noted that:

"If * * * the facts pleaded in the answer call for affirmative action, such as is required with respect to setoffs or counterclaims, the statute does operate to prevent such facts being pleaded. A setoff such as is pleaded in the instant case by the administrator has the characteristics of a cross-petition which requires what amounts to a counterjudgment. In other words, the pleading of the setoff calls for affirmative action of the court. The facts pleaded as a setoff do not arise out of any transaction pleaded in the petition." *Id.* at 405.

Summers adopted this general rule and applied it to the facts of that case. See *Summers v. Connolly, supra* at 414-415.

21. Defendant is not entitled to the amount of damages in excess of plaintiff's claim because the Statute of Limitations would bar any "affirmative action" by the court with respect to defendant's defense of recoupment. See *Summers v. Connolly, supra* at 405.

22. The Truth-in-Lending cases cited by defendant from other state jurisdictions, are inapposite. Those cases allowed claims that would have been barred as original actions by the Statute of Limitations, as we do here, but the basis of those decisions was partially grounded on state statutes governing the use of counterclaims. See *First National City Bank v. Drake* (1973, N. Y., Civ. Ct.) CCH Consumer Credit Guide Section 98, 939; *Wood Acceptance v. King, supra,* at 150. There is no relevant Ohio statute upon which a similar result could be based.

In addition holding that the Statute of Limitations bars the defense of recoupment would frustrate the fundamental policy of the Truth-in-Lending Act. That policy is designed to:

"* * * assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit * * *." Section 1601, Title 15, U. S. Code.

If defendant's claim of Truth-in-Lending violations is barred by the statute there is the:

"* * * potential for creditors to avoid largely the proscriptions of the Act merely by waiting one year to bring suit against the defaulting debtors. This would run directly contrary to the stated purpose of the Act. * * *" *Ballew v. Associates Financial Services Company of Nebraska, Inc.* (1976, U. S. Dist. Ct. D. Nebraska), CV 75-L-119, unreported p. 3. See also *State Employees Credit Union v. Sanchez* (Mich. Dist. Ct., 1976), Case No. 35265, unreported p. 2; *Wood Acceptance Co. v. King* (1974, Ill. App. Ct.), 18 Ill. App. 3d 149, 151.

For these reasons we conclude that the court below erred. The Statute of Limitations does not bar defendant's claim of recoupment based on the alleged Truth-in-Lending violations.

B. *Plan of Settlement in Separate Bankruptcy Proceeding.*

The Plan of Settlement in the bankruptcy case provided in paragraph 5:

"No member of the class shall have the right to set off against any loan balance remaining after credit to it as provided in Section 4 hereof. Without limiting the generality of the foregoing, this prohibition against setoff [*sic*] shall apply in any action before any court brought by the Trustee or his assignee for collection of said loan balance and interest accrued thereon * * *."[23]

The Plan of Settlement set forth the formula by which savings are to be reduced at a percentage of actual value and then setoff against the amount of the loans outstanding for that member of the Credit Union. The prohibition against future setoffs, read in the context of the entire Plan of Settlement, means that no future setoffs could be asserted by a member of the class at a ratio higher than that set forth in the Settlement. The term "set off," as used in the agreement, is limited and does not bar all possible claims arising out of the loan transaction.

However, even if the term meant all setoffs of any kind, the provision does not affect the instant defendant because he is asserting a claim of recoupment, not setoff. If the effect of the Plan of Settlement is deemed to prevent a recoupment, it frustrates the aim of the federal statute. This is an impermissible result.

The court below, therefore, erred in concluding that the Plan of Settlement barred the instant claims of Truth-in-Lending violations. The second assignment of error is well taken for the reason that neither the Statute of Limitations nor the Plan of Settlement bars defendant's counterclaim defense of recoupment.

Reversed and remanded with instructions to enter judgment for defendant.[24]

Judgment reversed.

JACKSON, C. J., and CORRIGAN, J., concur.

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23. Defendant is a member of the class bound by the Plan of Settlement, see fn. 4.

24. Defendant is not entitled to any damages in excess of the amount of plaintiff's complaint, see fns. 15 and 21.

Journal Entry of Ohio Court of Appeals

(Dated December 30, 1976)

No. 35265

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT, COUNTY OF CUYAHOGA

CONTINENTAL ACCEPTANCE CORP.,
Appellee,

vs.

GUADALUPE RIVERA,
Appellant.

APPEAL FROM CLEVELAND MUNICIPAL COURT

JOURNAL ENTRY

This cause came on to be heard upon the pleading and the transcript of the evidence and record in the Cleveland Municipal Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Cleveland Municipal Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

SEE OPINION INCORPORATED HEREIN BY REFERENCE.

Agreed Statement As the Record of Appeal of the Municipal Court of Cleveland, Ohio

Case No. B-103468

CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO

CONTINENTAL ACCEPTANCE CORP.,
Plaintiff-Appellees,

vs.

GUADALUPE RIVERA,
Defendant-Appellant.

AGREED STATEMENT AS THE RECORD ON APPEAL

The parties, by and through their attorneys, and pursuant to Rule 9(D) of the Ohio Rules of Appellate Procedure do hereby enter into this Agreed Statement As The Record On Appeal, and agree that the record shall be as follows:

1. This matter came before the Cleveland Municipal Court pursuant to a Complaint filed by Continental Acceptance Corp., a copy of which is attached hereto as Exhibit A, and an Answer filed by Guadalupe Rivera, a copy of which is attached hereto as Exhibit B.

2. Defendant filed a Motion for Summary Judgment, with brief, on May 20, 1975, a copy of which is attached hereto as Exhibit C. Plaintiff filed no written reply but opposed the Motion before the trial Court on July 28, 1975. The trial Court, Judge O'Bell presiding, denied the Motion other than on the merits to permit argument on all issues raised by the pleadings on stipulated facts a few days subsequent.

3. The trial Court, Judge O'Bell presiding, heard and decided the case, without trial, on facts stipulated by the parties as follows:

a. Defendant Rivera entered into a contract with the Steel Workers Credit Union, Inc. aka Federation Workers' Credit Union for the extension of a consumer credit loan together with credit insurance charges to be paid back in installments totaling $1,959.97. The terms of this transaction were disclosed to the Defendant in two documents copies of which are attached hereto as Exhibits D and E.

b. Sometime thereafter, said Credit Union filed for bankruptcy, without prior notice, in part due to large scale criminal embezzlement by its management.

c. At the time of the filing for bankruptcy, the Defendant had savings of $1,021.22 in said Credit Union; had consistently made payments on his loan debt by way of regular, voluntary deductions from his paycheck; and had an outstanding loan balance of $623.58.

d. During bankruptcy proceedings, the accounts of said Credit Union, including the accounts of the Defendant, were adjusted pursuant to a Stipulation of Plan of Settlement accepted by the Bankruptcy Court. A copy of The Stipulation of Plan of Settlement is attached hereto as Exhibit F. With respect and pursuant to said Stipulation of Plan of Settlement, the defendant received a credit of less than thirty-one (31) cents on the dollar for the amount in his savings account which was directly applied to his outstanding loan balance reducing that outstanding loan balance to $496.57. The Defendant did not opt out of the settlement and did not file a proof of claim pursuant to the settlement and was treated as a member of the class. Thereafter, and pursuant to an order of the Bankruptcy Court, the loan portfolio of said Credit Union including Exhibits D and E, with a face value of $1,090,000, was sold and transferred to the Plaintiff at a purchase price of $150,000.

4. On July 31, 1975, the trial Court, Judge O'Bell presiding, overruled and denied the issues raised by Defendant's Answer, on the grounds that the part of Defendant's Answer raising "Truth in Lending defenses" was (1) foreclosed to Defendant by paragraph 5 of the Stipulation of Plan of Settlement limiting the right of set-off and (2) precluded by the one-year Statute of Limitations of the Truth in Lending Act, Section 130(e), 15 U.S.C.A. §1640(e). The trial Court entered Judgment for the Plaintiff in the amount of $511.87.

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APPROVED:

.....
Judge

DATED: This ..... day of ....., 1975.

APPENDIX B

Stipulation of Plan of Settlement Entered Into in Petitioner's Assignor's Bankruptcy

(Filed April 25, 1974)

Civil Action No. C72-1257

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FRED C. JOHNSON, THERON C. HOUSEHOLDER, on behalf of themselves and all other similarly situated,
Plaintiffs,

vs.

FRED H. MANDEL, Trustee in Bankruptcy for Federation Workers' Credit Union, Inc. a bankrupt, et al.
Defendants.

STIPULATION OF PLAN OF SETTLEMENT

Subject to all necessary bankruptcy court approval insofar as Fred H. Mandel, Trustee in Bankruptcy, is a party hereto, and conditioned upon such approval, it is hereby stipulated that the above-captioned action may be settled and compromised upon the terms and conditions set forth below, but subject to the approval of this Court upon notice, hearing and procedures as hereinafter provided:

1. Subject to final consummation and Court approval of the settlement and compromise of this action upon the

terms set forth herein and made a part hereof, the parties agree that this action is maintained as a class action pursuant to Rule 23(a) and (b) (3) of the Federal Rules of Civil Procedure by the named plaintiffs on behalf of themselves and all others similarly situated. The parties further agree that subject to the conditions hereinabove described, the Court shall enter an order pursuant to Federal Rule 23(c)(1) that this action is maintained as a class action under subdivision (b)(3) of the said Rule, and that such order shall further provide the following:

(a) That the class shall be composed of, and defined as, all persons who advanced money, either directly or by payroll deduction into share accounts of Federation Workers' Credit Union, Inc. during the period of February 17, 1967 to April 26, 1972, and who had a "share account" remaining with Federation Workers' Credit Union, Inc. as of April 26, 1972.

(b) That individual notice in the form attached to this Stipulation as Exhibit "A" and made a part hereof, shall be directed to each member of the said class, and that the bankrupt estate of Federation Workers' Credit Union, Inc. shall bear the expense of printing and mailing of said individual notice to class members.

2. The parties agree that participation by any member of the class, as above defined, in the distribution of money made a part of this settlement as provided in paragraph 4(a) below, shall be conditioned upon that class member: (1) having not requested exclusion from the class; and (2) having filed a proof of claim either in the pending bankruptcy proceedings or in this Court, pursuant to paragraph 14 of the "Notice of Plan of Settlement and Hearing Thereon" made a part of this Stipulation and

annexed hereto as Exhibit "A". Failure to have filed said proof of claim by a class member who has not requested exclusion from the class shall bar that class member's participation in the money distribution as aforesaid, but such non-filing class member shall be entitled to receive the credit provided for, and defined by, paragraph 4(c) hereof.

3. Upon notice to class members as hereinabove provided, and upon approval by the Court of the settlement as fair, adequate and reasonable and in the best interest of the parties and members of the class, judgment will be entered dismissing the Complaint on its merits with prejudice.

4. Upon the entry of final judgment as specified in paragraph 3 above, no appeal having been taken and the time for appeal having expired, and upon expiration of the time provided class members in which to file, for those who have not already done so in the pending bankruptcy proceedings, proofs of claim in accordance with paragraph 14 of the "Notice of Plan of Settlement and Hearing Thereon" made a part hereof (Exhibit "A") Fred H. Mandel, Trustee, shall:

(a) Distribute the sum of Four Hundred Fifty Thousand Dollars ($450,000.00), less any amount returned to the bankrupt estate as hereinafter provided, in accordance with the terms set forth herein to all members of the class herein defined who have submitted proofs of claim in accordance with paragraph 14 of the "Notice of Plan of Settlement and Hearing Thereon" and made a part hereof (Exhibit "A"), for his or her own purposes except to the extent that said individual owes money to the Federation Workers' Credit Union, Inc. by virtue of a loan due and owing it,

including interest accrued thereon to date the judgment herein becomes final, no appeal having been taken and the time for appeal having expired. Said loan balance shall first be deducted from said payment and the loan account shall be credited therewith and the full amount owed thereon, even if it is not yet payable, shall be paid and the loan discharged to the extent of payment. In determining the class member's distribution, the Trustee shall divide the sum of $450,000.00 by $1,536,581.00 (adjusted to reflect any corrections to the records pursuant to the Order of Bankruptcy Court or otherwise), and multiply the result by the balance in the share account as shown by the records of Federation Workers' Credit Union, Inc. Any funds so distributed but unclaimed after an attempt to locate the class member, shall, upon application by the Trustee and proof satisfactory to this Court of a diligent attempt to locate the class member, then become an asset of the bankrupt estate of Federation Workers' Credit Union, Inc.

Nothing contained herein shall limit nor inhibit the Bankruptcy Trustee's right to object to any claim heretofore filed in the matter of Federation Workers' Credit Union, Inc., bankrupt nor to object to any claim hereafter filed in the above-captioned action.

(b) With respect to all funds being held for each individual class member as "loan payments" in the interest bearing account separate and apart from all other funds of the Federation Workers' Credit Union, Inc. pursuant to the Order of the Court of Common Pleas, Cuyahoga County, Ohio in the ac-

tion captioned *Miller v. Society National Bank of Cleveland*, the same being Case No. 911826 in said Court, shall to the extent that said individual class member owes money to the Federation Workers' Credit Union, Inc. by virtue of a loan due and owing it be paid to Federation Workers' Credit Union, Inc. and credited to the individual's loan account, even if it is not yet payable, and the loan discharged to the extent of payment, and any amount then remaining shall be paid to the individual for his or her own purposes. In making said determinations no interest shall be charged or payable on said loan account funds for the period said funds were held by Society National Bank, Trustee, and Fred H. Mandel, Trustee, except interest in an amount equal to the net interest earned by Society National Bank, Trustee, and Fred H. Mandel, Trustee. No charges or costs shall be payable by said fund for services rendered or costs incurred by Fred H. Mandel, Trustee, which costs and charges shall be paid as costs of administration of the bankrupt estate of Federation Workers' Credit Union, Inc. under Case No. B72-1611, in the United States District Court for the Northern District of Ohio, Eastern Division.

(c) To the extent that there are members of the class as herein defined who, after receiving the "Notice of Plan of Settlement and Hearing Thereon", made a part hereof (Exhibit "A"), do not request exclusion from the said class, but who have not filed or do not file proofs of claim as provided in paragraph 14 of the said Notice (hereinafter the "non-filing members"), the time for such filing having expired, the parties agree as follows. Pursuant to

Rule 23 of the Federal Rules of Civil Procedure, non-filing members shall be bound by this settlement and the final determination of the Court and entry of judgment. As provided herein, however, non-filing members shall be barred from participation in the cash distribution provided in paragraph 4(a) hereof. Such non-filing members shall, however, receive a credit in an amount equal to his or her respective proportion of the total funds distributed pursuant to paragraph 4(a), based upon Federation Workers' Credit Union, Inc. records relating to his or her share account, and such credit shall be applied against any unpaid balance on the non-filing member's Federation Workers' Credit Union, Inc. loan account if he or she has such a loan account. The credit provided for herein shall in no event exceed the unpaid balance of said non-filing member's loan accrued interest.

Any funds remaining after the specific distributions provided for herein shall be returned to the Trustee in Bankruptcy.

(d) Fred H. Mandel, Trustee, shall release and reassign to plaintiffs and in their names jointly and severally to and for the benefit of all members of the class as their interests appear, all right, title and interest to and for any and all sums of money due or properly due or payable or to become payable, and all claims, demands and causes of action of whatsoever kind, which the said Trustee in Bankruptcy, Fred H. Mandel, and his successors may have with respect to the following described fidelity bonds:

"CREDIT UNION DIRECTORS AND OFFICERS LIABILITY INSURANCE ENDORSEMENT", which appears as Endorsement No. 27 to the CREDIT UNION DISCOVERY BLANKET BOND, No. 2550 00 010992, issued by Employers Mutual Insurance Company of Wisconsin,

and irrevocably appoint the named plaintiffs, herein, either jointly or severally with full power of substitution and in the name of the Trustee or otherwise but for the sole use and benefit of all members of the class who were such as of April 10, 1972 to ask, demand, sue for, collect, compound and give acquittances for said claim or claims or any part thereof.

(e) Fred H. Mandel, Trustee, shall promptly commence and diligently pursue such action or causes of action against the State of Ohio as deemed appropriate, in his sole discretion with a view to compensating members of the class and others for the financial losses sustained and resulting from the ultimate bankruptcy of Federation Workers' Credit Union, Inc. In the event any funds or benefits are collected either directly or indirectly from the State of Ohio, the funds or benefits, after the payment of costs and expenses, shall be distributed (i) fifty percent (50%) to all members of the class, pro rata, to be applied in a manner consistent with all other distributions made hereunder, but not to exceed one hundred percent (100%) of the share account balance, and (ii) fifty percent (50%) to the Trustee in Bankruptcy of Federation Workers' Credit Union, Inc, plus any sum remaining after payment of one hundred

percent (100%) of the share account balance as provided in (i) above. The United Steelworkers of America have agreed to and shall pay up to Five Thousand Dollars ($5,000.00) of the legal costs and expenses incurred in the prosecution of the matters pursued by said Trustee. In conformity with this subparagraph 7(e) all fees and expenses incurred shall be separately accounted for and after Five Thousand Dollars ($5,000.00) has been expended by the Trustee, up to the next Five Thousand Dollars ($5,000.00) shall be billed to and paid for by the United Steelworkers of America. At such time as the aggregate sum of Ten Thousand Dollars ($10,000.00) has been expended in accordance with this provision, the parties agree that further prosecution of the aforesaid matters may be undertaken upon such terms as the parties may then agree upon. If no such agreement is entered into by or at that said time, the Trustee may, in his discretion, but upon reasonable evaluation of the circumstances then existing and the prospects for success of prosecution, terminate said prosecution.

(f) Notify all individuals whose loan balances were credited pursuant to subparagraphs (a), (b) and/or (c) hereof and the exact amount discharged as well as the balance due and owing, including accrued interest to date of the notice.

5. No member of the class shall have the right to set off against any loan balance remaining after credit to it as provided in Section 4 hereof. Without limiting the generality of the foregoing, this prohibition against set off shall apply in any action before any court brought by the

Trustee or his assignee for collection of said loan balance and interest accrued thereon.

In the event Employers of Wausau shall assert and establish any right to salvage in Items 4(d) and 4(e) above, any such claim shall be satisfied by the parties hereto in the same proportion as their interests may appear.

6. The within Stipulation of Plan of Settlement shall be filed with the Court and the parties shall request that the Court approve the "Notice of Plan of Settlement and Hearing Thereon" annexed hereto as Exhibit "A" and order that it be mailed to all members of the class as herein defined. The costs of such printing and mailing shall be borne by the bankrupt estate, as will the cost of printing and mailing to each class member of a notice of the time for filing proofs of claim, a form of such proof of claim and directions for filing same as provided in accordance with paragraph 7 of this Stipulation.

7. Upon approval of the Plan of Settlement by the Court as herein provided, the parties shall request the Court to order the mailing to each member of the class who has not requested exclusion from the class, a notice of the time for filing proofs of claim, a form of such proof of claim and directions for filing such proof of claim in accordance with paragraph 14 of the "Notice of Plan of Settlement and Hearing thereon" annexed hereto as Exhibit "A".

8. Upon approval of the Plan of Settlement (and affirmance of such approval on appeal, if any), such Plan of Settlement shall become final. In the event of disapproval by the Court of the Plan of Settlement (and affirmance of such disapproval on appeal, if any) such Plan

of Settlement shall be void and of no further force and effect.

GAINES & STERN CO., L.P.A.

By: /s/ HAROLD S. STERN
By: /s/ ROBERT N. RAPP

and

/s/ MARVIN A. SICHERMAN

(Counsel for Plaintiffs Fred C. Johnson, et al. and the United Steelworkers of America)

/s/ FRED H. MANDEL

Trustee in Bankruptcy

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Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1977

No. 77-95

CONTINENTAL ACCEPTANCE CORP.,
Petitioner,

vs.

GUADALUPE RIVERA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, EIGHTH JUDICIAL DISTRICT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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Supreme Court of the United States

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CONTINENTAL ACCEPTANCE CORP.,
Petitioner,

vs.

GUADALUPE RIVERA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, EIGHTH JUDICIAL DISTRICT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Statement of Facts[1]

Respondent Rivera entered into a contract on or about May 15, 1970 with the Steel Workers Credit Union (also known as the Federation Workers' Credit Union) for the extension of a consumer credit loan together with credit insurance charges to be paid back in installments totalling $1,959.97. The terms of this transaction were disclosed to Rivera in two documents entitled "Consumer Credit

1. All facts stated herein are taken from the agreed statement as the record on appeal which is set forth in the appendix at pp. A15-A17 of the petition for writ of certiorari.

Disclosure Form for Credit Union" and "Insurance Disclosure and Request for Coverage." Rivera also signed a promissory note.

Sometime thereafter, the credit union filed a petition in bankruptcy, without prior notice, in part due to large scale criminal embezzlement by its management. At the time the bankruptcy action was filed, Rivera had savings of $1,021.22 invested in share accounts in the credit union. He was current on his loan debt and had reduced his outstanding loan balance to $623.58.

During bankruptcy proceedings, the accounts of the credit union, including Rivera's account, were adjusted pursuant to a stipulated plan of settlement accepted by the Bankruptcy Court. A copy of this stipulation is included in Petitioner Continental Acceptance Corporation's appendix at pp. A18-A27. Under the stipulation, Rivera received a credit of less than thirty one cents (31¢) on the dollar for the amount invested in his share account; the credit was directly applied to his outstanding loan balance and reduced the balance to $496.57.

Rivera did not opt out of the stipulated settlement. He was treated as a member of the class. Thereafter, and pursuant to the order of the Bankruptcy Court, the loan portfolio of the credit union with a face value totalling $1,090,000 was sold and transferred to Continental Acceptance Corporation at a purchase price of $150,000.

Statement of the Proceedings Below

On December 19, 1974 Continental filed suit against Rivera in the Cleveland Municipal Court to collect $496.57 allegedly due on Rivera's note. Rivera filed an answer asserting as a defense by way of recoupment that a violation of the disclosure requirements set forth in the federal Truth in Lending Act, 15 U.S.C. §§1601 et seq., had occurred at the time the loan transaction was consummated.

On July 31, 1975 the trial court entered judgment for Continental in the amount of $511.87 (the loan balance plus interest) and ruled that Rivera's recoupment defense was foreclosed by the stipulated settlement in the bankruptcy proceeding and was precluded by the one year statute of limitations set forth in the Truth in Lending Act at 15 U.S.C. §1640(e).

Rivera filed a timely appeal in the Cuyahoga County Court of Appeals. On December 30, 1976 that Court reversed the decision of the trial court and remanded the action with instructions to enter judgment for Rivera. The Appellate Court held that a Truth in Lending Act disclosure violation had occurred and that neither the stipulated settlement in the Bankruptcy Court action nor the statute of limitation in the Truth in Lending Act precluded Rivera from raising the disclosure violation as a recoupment defense.

Continental filed a timely motion to certify the record to the Ohio Supreme Court and set forth the following two propositions of law for review:

> 1. Where facts pleaded in an answer assert a claim long-barred by a specific statute of limitations and call for affirmative action and there is no statute permitting a defendant to raise such a claim, the statute of limitations bars such request for relief despite the fact that the claim is raised for the purpose of reducing a plaintiff's claim.
>
> 2. A claim which is an "extrinsic by-product" of a contractual transaction is in the nature of setoff,

not recoupment, and barred by a specific statute of limitations.

Continental did not appeal from the ruling by the Court of Appeals that a disclosure violation had occurred. Nor did it appeal from the ruling that Rivera's defense was not precluded by the stipulated settlement in the bankruptcy proceeding.

The Ohio Supreme Court overruled Continental's motion to certify the record on April 21, 1977. On July 15, 1977 Continental filed a petition for writ of certiorari in this Court.

ARGUMENT

(A) THE RULING THAT AN OHIO COURT WILL RECOGNIZE A VIOLATION OF THE TRUTH IN LENDING ACT AS A RECOUPMENT DEFENSE TO AN ACTION ON A NOTE BROUGHT IN AN OHIO COURT DOES NOT PRESENT A QUESTION OF FEDERAL LAW.

This action was brought in the Municipal Court of Cleveland, Ohio by Continental Acceptance Corporation to recover $496.57 on a note signed in conjunction with a loan agreement. Continental's claim arose strictly as a matter of state law. The Court of Appeals of Cuyahoga County ruled that the courts of Ohio will recognize a violation of the Truth in Lending Act, 15 U.S.C. §§1601 et seq., as a recoupment defense to such a state law claim. This ruling does not interpret or determine the validity of the federal statute. Rather, it interprets the common

law doctrine of recoupment[2] as recognized by the courts of Ohio. For this reason petitioner is incorrect in invoking the jurisdiction of this Court under 28 U.S.C. §1257(3).

It is noteworthy that the Truth in Lending Act clearly asserts the right of states to require disclosures in credit transactions except for those disclosures that would be inconsistent with the requirements of the federal law. Section 1610(a) of the Act states:

> This title [U.S.C. §§1601 et seq.] does not annul, alter, or affect, or exempt any creditor from complying with, the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this title [15 U.S.C.

---

2. Recoupment is an ancient common law doctrine, long established in Ohio, under which a defendant can reduce or defeat a claim by asserting some breach of a duty by the plaintiff as a defense. *Steamboat Wellsville v. Geisse*, 3 Ohio St. 333 (1854); *M. B. Upton & Co. v. I. J. Julian & Co.*, 7 Ohio St. 95 (1857); *Conway v. Ogier*, 115 Ohio App. 251, 184 N.E.2d 681 (1961). The recoupment defense must arise out of the same transaction that gave rise to the plaintiff's claim. *Brunet v. Paper Box Co.*, 16 Ohio N.P. (n.s.) 465, 26 Ohio Dec. 163 (1914). A defense by way of recoupment will not support a recovery greater than the plaintiff's claim, but may only be used to equalize or defeat it.

Under Ohio decisions, a recoupment defense will be heard although an affirmative action raising the claim would be barred by the statute of limitations. *Summers v. Connolly*, 159 Ohio St. 396, 112 N.E.2d 391 (1953); *Mount v. Dircksen*, 118 Ohio App. 371, 194 N.E.2d 903 (1963). Thus, for example, in *Conway v. Ogier, supra*, a physician sued a former patient for a fee. The defendant was permitted, under the doctrine of recoupment, to raise a malpractice claim as a defense to the suit, even though the statute of limitations for an independent malpractice action had already run.

Ohio also has a statute, which was not applied in this case, which permits similar results in some circumstances. §2309.19 O.R.C.; *Benson v. Rosine*, 76 Ohio App. 439, 64 N.E.2d 845 (1945); *Shriner v. Price*, 74 Ohio App. 373, 59 N.E.2d 152 (1944). The doctrine of recoupment is also found in the federal common law, as well as that of many other states, as will be discussed in section B of this brief.

§§1601 et seq.] or regulations thereunder, and then only to the extent of the inconsistency.

Furthermore, the Act specifically permits a state to pass legislation substantially similar to the Truth in Lending Act and authorizes the Federal Reserve Board to exempt any such state from the provisions of the federal law.

> The Board shall by regulation exempt from the requirements of this chapter [15 U.S.C. §§1631 et seq.] any class of credit transactions within any State if it determines that under the law of that State that class of transactions is subject to requirements substantially similar to those imposed under this chapter [15 U.S.C. §§1631 et seq.], and that there is adequate provision for enforcement. 15 U.S.C. §1633.

Under these provisions a state could pass a disclosure law similar or even identical to the federal law and extend the limitation period for filing suit in state court. It is unreasonable and unwarranted to argue that the same state could not discourage disclosure violations by recognizing its own common law doctrine of recoupment in a state court collection suit. There is certainly nothing contained in section 1640(e) of the Truth in Lending Act that suggests such an unreasonable result.

(B) THE RULING BELOW IS IN CONFORMITY WITH THE FEDERAL COMMON LAW DOCTRINE OF RECOUPMENT AND IS CONSISTENT WITH THE PURPOSES OF THE TRUTH IN LENDING ACT.

Even if federal law rather than the state law of recoupment applies to this case a review of the decisions

of this Court makes clear that the recoupment defense would be authorized in this action.

In *Bull v. United States*, 295 U.S. 247, 55 S. Ct. 695 (1935) the issue was whether a certain sum of money should be subject to income tax or estate tax or both. Executors of the estate of the taxpayer had previously paid estate taxes on the money and were being assessed income taxes on the same funds. The Court held that the money was subject only to income taxes. Although a claim for return of the estate taxes would have been barred by the statute of limitations, this Court allowed the estate tax overpayment to be raised as a recoupment defense to the assessment of income taxes. In so holding the court said:

> [r]ecoupment is in the nature of a defense *arising out of some feature of the transaction* upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely. 295 U.S. at 262 (emphasis added.)

The holding of the *Bull* case *supra*, applies to the case at bar. Continental attempts to avoid the force of the *Bull* decision by arguing that the statute of limitations in the Truth in Lending Act is "jurisdictional" and somehow bars any claim including recoupment based upon a violation of the Act after one year. See brief of petitioner at pp. 8-9. Continental has cited no case that has so held.

The same argument was made to this Court and rejected in the case of *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 77 S. Ct. 161 (1956). In that case a rail carrier sued the United States under the Tucker Act, 28 U.S.C. §2501, for failure to pay the proper tariff

rates for a shipment. The government defended by arguing that a lower rate was applicable; it further asserted that if the higher tariff were applicable, then the rate was unreasonable. An affirmative action to contest the reasonableness of the rate would have been barred by the limitation clause in the Interstate Commerce Act, 49 U.S.C. §16(3)(a).

In holding that the government's claim of unreasonableness could be raised despite the passage of the limitation period, the Court said:

> [t]he basic policy behind statutes of limitations has no relevance to the situation here. The purpose of such statutes is to keep stale litigation out of the courts. They are aimed at lawsuits, not at the consideration of particular issues in lawsuits. Here the action was already in court and held to have been brought in time. To use the statute of limitations to cut off the consideration of a particular defense in the case is quite foreign to the policy of preventing the commencement of stale litigation. We think it would be incongruous to hold that once a lawsuit is properly before the court, decision must be made without consideration of all the issues in the case and without the benefit of all the applicable law. If this litigation is not stale, then no issue in it can be deemed stale.

It is argued that this Court has construed §16(3) as "jurisdictional" and that the Commission is therefore barred absolutely from hearing questions as to the reasonableness of rates arising in suits brought after two years, whether such questions come to the Commission by way of referral or in an original suit. . . . But here the Government is not asserting a right

> to affirmative recovery. It is seeking only to have adjudicated questions raised by way of defense. *It is therefore irrelevant whether the statute of limitations is "jurisdictional" or not*; the question would still remain whether Congress intended it to apply to referrals as well as to affirmative suits . . .
>
> *We hold, therefore, that the limitation of §16(3) does not bar a reference to the Interstate Commerce Commission of questions raised by way of defense* and within the Commission's primary jurisdiction, as were these questions relating to the applicable tariff. 352 U.S. at pp. 72-74 (emphasis added.)

In a similar vein this Court has ruled that labeling a limitation "substantive" rather than "procedural" does not restrict the ability of a court to toll the limitation period in appropriate circumstances. In *American Pipe and Construction Co. v. Utah,* 414 U.S. 538, 94 S. Ct. 756 (1974) certain purported class members attempted to intervene in an antitrust suit following denial of class certification by the trial court. Defendant argued that the attempted intervention was barred by the limitation set forth in the Clayton Act, 15 U.S.C. §15(b) and 15 U.S.C. §16(b).

The Court, after reviewing a number of previous decisions, refused to decree that a right is extinguished for all purposes by the passage of time because the limitation period in a statute is deemed substantive. The Court stated:

> These cases fully support the conclusion that the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the

federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose. 414 U.S. at 559

This Court has made it clear in the decisions cited above that a recoupment defense is permissible whenever the main action is timely. Petitioner cannot meritoriously claim that a defense can be barred merely by calling a limitation on bringing an affirmative action "substantive" as opposed to "procedural" or by deeming the limitation to be "jurisdictional".

The case at bar is a classic example of a case to which the doctrine of recoupment applies. Respondent Rivera had savings of $1,021.22 invested in a credit union; he had a loan outstanding from the credit union. When the credit union filed a petition in bankruptcy, Rivera lost his savings and had his loan balance reduced by $127.01. Continental Acceptance Corporation purchased the loan accounts of the credit union for less than fourteen cents (14¢) per dollar and sought to collect the loan balance under the contract entered into between Rivera and the credit union.

Continental does not dispute the fact that in the course of entering into the contract it seeks to enforce, the credit union violated the Truth in Lending Act. The only documents that evidence the contract entered into by Rivera and the assignor of Continental are a form entitled "Consumer Credit Disclosure Form for Credit Union," a separate credit insurance form, and a promissory note, all of which were executed on May 15, 1970. These very documents establish the existence of the disclosure violations asserted by Rivera. Thus the same documents that support Continental's claim for relief establish the violation that supports Rivera's recoupment claim. It would be

incongruous to hold that a court is bound to enforce contract claims evidenced by documents signed by the parties to the contract, but that the court is prohibited from reviewing the same documents to determine whether in the course of entering into the contract one of the parties violated a federal law designed for the protection of the other party.

Moreover, permitting recoupment defenses furthers a fundamental policy of the Truth in Lending Act. Enforcement of the Act by private litigation is strongly encouraged. The Act provides a simple mechanism for determining damages based upon the amount of finance charges assessed and limited by minimum and maximum awards. 15 U.S.C. §1640(a). The Act requires the payment of reasonable attorney's fees in any successful action. 15 U.S.C. §1640 (a)(3). It would be inconsistent with the policy of encouraging private enforcement of the Act to bar determination of violations in recoupment cases.

Barring recoupment defenses would be inconsistent with the very policy of statutes of limitations of preventing stale claims from being adjudicated by the courts. Such a decision would encourage creditors to wait for one year before bringing suit to collect on delinquent debts. The effect would be to reward creditors who allow claims to become stale rather than to encourage prompt litigation of disputes. As this court stated in *United States v. Western Pacific Railroad Co., supra*:

> We may assume without deciding, that the Government would have been barred by §16(3) from filing an affirmative suit before the Commission to recover overcharges from a carrier. Nevertheless we do not think that the statute operates to bar reference to the Commission of questions raised by way of defense

in suits which are themselves timely brought. Respondents in effect ask us to hold that a suit may be brought for six years but that certain defenses thereto may be raised only for two years. *Only the clearest congressional language could force us to a result which would allow a carrier to recover unreasonable charges with impunity merely by waiting two years before filing suit.* 352 U.S. at p. 71. (emphasis added.)

(C) PETITIONER'S CONTENTION THAT SECTION 1640(h) OF THE TRUTH IN LENDING ACT PROHIBITS A STATE COURT FROM RECOGNIZING A VIOLATION OF THE ACT AS A RECOUPMENT DEFENSE WAS NOT RAISED BELOW, IS NOT PROPERLY BEFORE THIS COURT, AND RESTS UPON A MISINTERPRETATION OF THE STATUTE.

In the questions presented for review petitioner questions whether Rivera's Truth in Lending defense is foreclosed by the offset provision of the Act, 15 U.S.C. §1640(h). There is, however, no discussion of this issue in petitioner's brief except for an admission that the issue was not briefed in the Court of Appeals below. (See petitioner's argument in support of petition for Writ of Certiorari at p. 16 n.9.) In addition, Continental failed to raise the issue in its motion to certify the record to the Supreme Court of Ohio. (See Continental's propositions of law to the Supreme Court of Ohio set forth in Respondent's Statement of the Case, *supra.*) Because petitioner failed to raise this issue below, it is not properly before this court now. *Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 147, 90 S. Ct. 1598, 1602-1603 n.2 (1970); *Lawn* v. *United States*, 355 U.S. 339, 362-363, 78 S. Ct. 311, 324-325 n.16 (1958).

It should also be pointed out that section 1640(h) by its terms has nothing to do with the statute of limitations or recoupment. The Senate Report that discusses the section describes its purpose as follows:

> The Committee amended bill also provides that a consumer may not recover damages (other than actual damages) by right of offset unless the consumer was a party to a court action in which the liability was determined. This provision is intended to prevent consumers from simply deducting from their obligation to a creditor the minimum $100 award, which is provided for in individual actions, without being a party to an action in which such a liability is determined by a court. However, nothing in this action prevents a series of individual civil actions to recover $100 in the case of any violation.
>
> S. Rep. No. 93-278, 93d Cong., 1st Sess. (1973) at 16.

Nothing in the statute or the legislative history supports the contention that section 1640(h) was intended to have any effect upon the recoupment issue now before this Court. This conclusion is further supported by a recently proposed amendment to the Truth in Lending Act. In introducing a bill to amend the Act, Senator Proxmire, a sponsor of the original Act and a member of the Senate Subcommittee on Consumer Affairs of the Committee on Banking, Housing and Urban Affairs, has proposed the following amendment to section 1640(h):

> SEC. 14. Section 130(h) of the Truth in Lending Act is amended by adding at the end thereof the following new sentence: "This subsection may not be construed to prohibit such person from raising a creditor's violation of this title by way of recoupment,

offset, or counterclaim in an action before a court of competent jurisdiction where permitted by law."

S. 1312 95th Cong., 1st Sess., Introduced April 20, 1977.

Senator Proxmire explained the reason for the amendment in these terms:

SEC. 14. Set-off rights.—Would amend section 130(h) of the Truth in Lending Act to make clear that this section, which prohibits a borrower from offsetting Truth in Lending damages against a debt owed unless a court has found a Truth in Lending violation, does not prohibit a borrower from raising a creditor's violation by way of recoupment or similar doctrine where permitted by State law. It was Congress' intent in enacting this section in 1974 to prohibit a debtor from unilaterally offsetting alleged damages but not to prohibit the borrower from seeking an offset in a legal action. This amendment will supersede an erroneous court decision on this subject.

Section by section analysis of S. 1312.

There can be little doubt that section 1640(h) is irrelevant to the issue before this Court.

As this proposed amendment makes clear, the very issue raised by petitioner herein is receiving Congressional attention. Passage of the amendment would render the issue moot. Under these circumstances there would seem to be little reason for this Court to exercise its discretionary power to review the decision below on writ of certiorari.

(D) PETITIONER'S CONTENTION THAT A SETTLEMENT PLAN IN AN UNRELATED BANKRUPTCY ACTION IS SOMEHOW RELATED TO THE ISSUES IN THIS ACTION WAS NOT RAISED BELOW AND IS NOT PROPERLY BEFORE THIS COURT.

Petitioner also questions whether the decision below is inconsistent with a consented settlement plan in an unrelated bankruptcy action. That issue raises no federal statutory issues for review by this Court. Moreover, petitioner neither raised this issue as a proposition of law nor submitted a memorandum in support of it in its motion to certify the record to the Supreme Court of Ohio. It is therefore precluded from raising the issue before this Court. *Adickes v. S. H. Kress and Co., supra; Lawn v. United States, supra.*

CONCLUSION

For the foregoing reasons Respondent Rivera submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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